

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF RANCHO PALOS VERDES, :

4 CALIFORNIA, ET AL., :

5 Petitioners :

6 v. : No. 03-1601

7 MARK J. ABRAMS. :

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9 Washington, D.C.

10 Wednesday, January 19, 2005

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 10:03 a.m.

14 APPEARANCES:

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16 the Petitioners.

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20 supporting the Petitioners.

21 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the

22 Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JEFFREY A. LAMKEN, ESQ.	
4	On behalf of the Petitioners	3
5	JAMES A. FELDMAN, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioners	18
8	SETH P. WAXMAN, ESQ.	
9	On behalf of the Respondent	27
10	REBUTTAL ARGUMENT OF	
11	JEFFREY A. LAMKEN, ESQ.	
12	On behalf of the Petitioners	52
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:03 a.m.)

JUSTICE STEVENS: We'll now hear argument in the
City of Rancho Palos Verdes against Abrams.

Mr. Lamken.

ORAL ARGUMENT OF JEFFREY A. LAMKEN
ON BEHALF OF THE PETITIONERS

MR. LAMKEN: Thank you, Justice Stevens. May it
please the Court:

This case concerns whether Congress, in enacting
section 332(c)(7) of the Communications Act, intended to
expose local governments and State and local officials to
expansive section 1983 liability with the tens of
thousands of wireless antenna zoning decisions they must
make each year.

Entitled preservation of local zoning authority,
section 332 provides for State and local agencies in the
first instance to implement specific Federal substantive
and procedural requirements, together with preserved State
zoning laws, in passing on applications to build or modify
wireless towers. It then provides a highly distinctive,
independent cause of action for accelerated judicial
review of the decisions, including a short limitations
period and mandatory expedition. That tailored process is
sufficiently comprehensive to evidence Congress' intent

1 for enforcement to occur --

2 JUSTICE O'CONNOR: Well, Mr. Lamken, it's not as
3 comprehensive as other schemes where the Court said, on
4 that basis, we would not find a section 1983 cause of
5 action, is it? I mean, it's -- it's more sparse.

6 MR. LAMKEN: It -- it is unusual in its unique
7 focus on private enforcement, but there was a reason for
8 the focus on private enforcement. In other provisions of
9 the Communications Act, the Congress chose -- for example,
10 section 253, Congress chose to eliminate enforcement at --
11 at the FCC level because it was concerned that State and
12 local governments often wouldn't have enough -- excuse me
13 -- local governments in particular --

14 JUSTICE O'CONNOR: Well, what -- what --

15 MR. LAMKEN: -- wouldn't be able to -- I'm
16 sorry.

17 JUSTICE O'CONNOR: What would you think of a
18 case where the plaintiff alleges that the antenna zoning
19 was the -- was caused by racial discrimination against the
20 applicant? Would there be a 1983 cause of action, do you
21 suppose?

22 MR. LAMKEN: Yes. That would still be available
23 because the -- the section 332(c)(7)(B)(v) only provides
24 for a cause of action for violations of the Communications
25 Act. Violations of the Constitution continue to be

1 enforceable directly under section 1983.

2 Section -- section 332(c)(7)(B)(v) is
3 comprehensive in the relevant sense in that for every
4 violation of section 332(c)(7), for every person adversely
5 aggrieved, it provides a mechanism for private judicial
6 enforcement. In addition --

7 JUSTICE O'CONNOR: Well, what about -- it -- it
8 -- section 332 speaks of an award of all appropriate
9 relief. What does that include? Could it include
10 punitive damages? Could it include attorney's fees, do
11 you think?

12 MR. LAMKEN: In that respect, it is
13 indistinguishable -- for example, the statute that was at
14 issue in Smith v. Robinson, and it doesn't specify the
15 precise forms of relief available. In our view in this
16 case, appropriate relief would mean specific relief, the
17 type of relief that is traditionally given on review of
18 zoning decisions and on review of judicial review of
19 agency action. That's supported by a number of
20 considerations.

21 I should point out, in the first instance, that
22 in this case respondent never did seek damages, or
23 punitive damages for that matter, under section
24 332(c)(7)(B)(v) itself.

25 But that's supported by a number of

1 considerations.

2 First is the structure of the act, which
3 presents it as a form of judicial review of agency action.
4 The act is structured much as you have -- much as you
5 would when a Federal agency enforces or implements Federal
6 requirements and are subject to judicial review. The only
7 difference is that Congress swapped in, effectively, State
8 and local agencies with the initial implementers in place
9 of the Federal Government. In that respect, it shares
10 some of the characteristics of sections 251 and 252 of the
11 Communications Act which are also implemented by local --
12 by -- excuse me -- by State governments as opposed to the
13 FCC.

14 JUSTICE GINSBURG: Mr. -- Mr. Lamken, the
15 argument has been made that 4 years before the
16 telecommunications act we're talking about was adopted,
17 Congress adopted the Cable TV Consumer Protection Act.
18 And in that act, it specifically limited the remedies to
19 declaratory and injunctive relief. Here we face silence.
20 Isn't that an indication that when Congress wants to limit
21 relief to declaratory and injunctive, it will say so in
22 the -- in the measure?

23 MR. LAMKEN: Justice Ginsburg, that -- that's an
24 example where Congress, for a broad range of statutes that
25 could be potentially used to enforce the Cable Act, chose

1 to restrict the forms of relief available. And it is an
2 example, in the words of Sea Clammers, where Congress has
3 made its intent explicit in the text of the statute.

4 Congress can also by implication limit the forms
5 of -- excuse me -- limit the mechanism for relief that's
6 available, and that's our position here, that Congress by
7 providing --

8 JUSTICE SOUTER: What's the -- what's the source
9 of the implication?

10 MR. LAMKEN: Pardon?

11 JUSTICE SOUTER: You say by implication.

12 MR. LAMKEN: The implication -- Congress has
13 provided a specific mechanism for judicial relief here,
14 section 332(c)(7)(B)(v) itself, and that is a highly
15 adapted mechanism which includes unique characteristics
16 such as a very short limitations period.

17 JUSTICE SOUTER: So -- so the -- the
18 implication, I -- I guess, is that unless it specifically
19 provides for damages, it implicitly does not.

20 MR. LAMKEN: I'm sorry. In terms of Congress
21 making damages available under 332(c)(7)(B)(v), our view
22 of the damage -- then it might -- damages are only one of
23 the differences we think that exists here.

24 But our view is supported by a number of
25 considerations, in addition to the structure of the

1 statute. For example, appropriate relief is often -- is
2 the traditional form of relief available. In this context
3 traditional relief was always specific relief. Congress
4 also included a specific savings clause that extends not
5 merely to Federal statutes, but prohibits the
6 impairment --

7 JUSTICE SCALIA: Excuse me. Where -- where are
8 you getting the term, appropriate relief, from?

9 MR. LAMKEN: This -- that comes from this
10 Court's decision in Franklin, that where Congress doesn't
11 specifically identify the specific forms of relief
12 available --

13 JUSTICE SCALIA: All right. But that's --
14 that's not in the -- that's not in the text of this
15 statute, is it?

16 MR. LAMKEN: No, it isn't. It is an inference
17 the Court draws from silence. When the Court -- when
18 Congress provides an express cause of action and does not
19 identify the specific forms of relief available, the Court
20 will infer that Congress intended to provide all
21 appropriate relief. But the term, appropriate relief, is
22 that relief which Congress would have intended, and when
23 the Court is determining that, it takes a look at what the
24 traditional forms of relief are and it will look at things
25 such as the savings clause in 601(c), which expressly says

1 that the statute should not be read, unless it expressly
2 provides, to supersede, impair, or otherwise modify State
3 and local law, as well as Federal law. And in order to
4 put damages into the statute, if it doesn't provide
5 damages expressly, one would have to impair myriad
6 municipal immunity laws that otherwise protect
7 municipalities and State and local officers implementing
8 zoning requirements from liability.

9 Finally, the FCC has --

10 JUSTICE SCALIA: And -- and 1983 is not subject
11 to that limitation.

12 MR. LAMKEN: Well, 1983 is expressly preemptive
13 under this Court's decisions, and it is -- it would
14 preempt the State laws by its own force. But we believe
15 that that also supports Congress' decision not to provide
16 -- or supports the conclusion that Congress did not intend
17 to provide section 1983 relief here because the effect of
18 making the Communications Act enforceable under section
19 1983 would be to expand the categories of claims for which
20 -- that -- those immunities are unavailable, and it would
21 thereby impair those immunities.

22 JUSTICE SCALIA: But are they only immune from
23 damages action or are they immune from suit?

24 MR. LAMKEN: No. They're generally immunities
25 -- immune from damages actions, not from suits.

1 JUSTICE SCALIA: So, I mean, that proves too
2 much because they -- the statute obviously intends to
3 eliminate that immunity. The immunity from suit is -- is
4 clearly --

5 MR. LAMKEN: Oh, I think -- I think you may have
6 misunderstood. The immunity is not from suit. It's an
7 immunity from damages and the impairment would be the
8 immunity from damages. Section 332 is not designed to
9 impair the municipal immunity statutes, and they are not
10 immunities from suit. They are generally from damage
11 liability. The officers are subject to suit because these
12 are subject --

13 JUSTICE SCALIA: Well, it allows suit against
14 either municipalities or States, State or local
15 governments. Right?

16 MR. LAMKEN: Yes.

17 JUSTICE SCALIA: And the States have immunity
18 not just from damages but from suit.

19 MR. LAMKEN: As a constitutional matter, they
20 have an immunity from suit, but --

21 JUSTICE SCALIA: Unless they have chosen to
22 waive it, which --

23 MR. LAMKEN: Right.

24 JUSTICE SCALIA: -- one must assume in this area
25 they haven't.

1 MR. LAMKEN: Right.

2 JUSTICE SCALIA: So you have to regard this
3 provision as intentionally overriding some provisions of
4 State law in -- inasmuch as they apply to -- to immunity.

5 MR. LAMKEN: Well, first of all, I don't think
6 it would be read to -- to override the State's
7 constitutional immunity to suit.

8 JUSTICE SCALIA: No. That's --

9 MR. LAMKEN: But it would be read to -- it would
10 be read to override immunities to suit that exist under
11 State law because otherwise it couldn't be affected.

12 JUSTICE SCALIA: In for a penny, in for a pound.

13 MR. LAMKEN: Right.

14 JUSTICE SCALIA: If they've -- if they've
15 waived --

16 MR. LAMKEN: But I'm not --

17 JUSTICE SCALIA: If -- if you acknowledge that
18 it was intended to affect their immunity from suit, why --
19 why would we suspect that it was not intended to affect
20 their immunity from damages?

21 MR. LAMKEN: Well, because it would be -- it
22 would be a provision with no effect whatsoever if it
23 didn't override immunities to suit.

24 But I'm not sure there are provisions that are
25 providing for -- I mean, that there are myriad damages

1 immunity laws that provide municipalities absolute
2 immunity from suit. It's fairly common, at least under
3 California and other State law, for municipalities to be
4 subject to suit for review of their -- of the actions that
5 they make. And that is the typical fashion that this --
6 this statute simply incorporated that typical fashion of
7 providing judicial review of agency action.

8 Another consideration that supports the view
9 that section 1983 has been displaced is that the act
10 provides an entire process for the implementation of the
11 Federal statutes. It establishes Federal substantive
12 requirements that identifies the agencies to implement
13 them. It provides Federal procedural guarantees, APA-
14 like guarantees, like the requirement of substantial
15 evidence, like the requirement of a written decision, like
16 the requirement of a decision with a reasonable period of
17 time.

18 It then follows up with a mechanism, an adapted
19 mechanism for judicial review. In that sense, it is very
20 much like the statute at issue in *Smith v. Robinson*.

21 That elaborate process is particularly
22 significant given the pattern of the Communications Act as
23 a whole. The Communications Act repeatedly matches
24 specific regulatory requirements such as, for example, the
25 common carrier requirements in 202 and 203, with

1 corresponding mechanisms for private enforcement, such as
2 an action for suit -- I mean, an action for damages in
3 court or an enforcement action in the commission in
4 sections 206 and 207.

5 JUSTICE SCALIA: Does this action have to be
6 brought in Federal court? It says any court of competent
7 jurisdiction. Could --

8 MR. LAMKEN: Yes. The action can be brought in
9 State court and often is. There are about 50 reported
10 decisions that we have found where the suit has been
11 brought in State court. I haven't seen a particular
12 pattern between the choice, but Congress gave the option.

13 JUSTICE KENNEDY: Would a State court be free to
14 award damages or would that be preempted under the view
15 you take of the statute?

16 MR. LAMKEN: The State -- because there's an
17 express preservation of State law in this context, I think
18 that State -- States would be free to award damages under
19 their own laws. They wouldn't -- whatever relief is
20 available under the Federal statute would be available
21 under the available under the Federal statute, and State
22 courts wouldn't be free to second-guess Congress' judgment
23 as to what relief should be provided under Federal
24 statute.

25 JUSTICE KENNEDY: If the State court allowed

1 damages -- if -- if the State system allowed -- State law
2 allowed damages, would the Federal court, in an action
3 under this section, be allowed to award damages under that
4 -- under the State statute?

5 MR. LAMKEN: Your Honor, I think since the --
6 the provision, the savings clause, says that the statute
7 should not be construed to impair State law -- and there
8 are so many municipal immunity statutes and you would only
9 have one construction of the statute -- I believe that the
10 construction would be an across-the-boards construction,
11 that this act does not provide damages and you would not
12 vary from State to State.

13 JUSTICE STEVENS: What if the State law
14 authorized the recovery of attorney's fees? Would they be
15 recoverable?

16 MR. LAMKEN: Pardon?

17 JUSTICE STEVENS: What if the State law
18 authorized the recovery of attorney's fees?

19 MR. LAMKEN: Well --

20 JUSTICE STEVENS: What would you do then?

21 MR. LAMKEN: If the State law provides for
22 recovery of attorney's fees for State violations, then
23 that would control for State violations. For violations
24 of Federal law, the -- the remedies that Congress chose to
25 provide would control and the States would not be

1 permitted to second-guess the -- the remedies --

2 JUSTICE BREYER: I'm not sure why that would be
3 if you, in fact, see the statute as trying to impose an
4 APA-like structure, saying to the States, you decide the
5 substance, we'll give you minimum elements of form, which
6 helps your position. Then if the minimum elements of form
7 are not specifically stated in the statute, there's no
8 reason to interfere with the States. Let them do what
9 they want. Only those minimum elements are what you can't
10 do. That works perfectly for you.

11 MR. LAMKEN: Justice Breyer --

12 JUSTICE BREYER: It's strongly supported in the
13 history. It may lose your client the money. I don't
14 know.

15 MR. LAMKEN: Well, in fact, California provides
16 a municipal immunity for permitting decisions, and so my
17 client --

18 JUSTICE BREYER: So then you're only --

19 MR. LAMKEN: -- would be fine with your
20 position. But that is a potential inference. My -- the
21 normal view would be that where Congress provides a -- a
22 statute, one would normally presume that Congress intended
23 a particular set of remedies to accompany it. You could
24 say that the silence is meant to -- meant to reflect the
25 fact that Congress knew that these would be enforced in

1 State courts, as well as Federal, and it would allow State
2 courts --

3 JUSTICE BREYER: Congress didn't care.

4 MR. LAMKEN: -- to use whatever --

5 JUSTICE BREYER: Congress wanted to substitute a
6 Federal judgment for the judgment of the States where it
7 said so. And the reason you know that is because that is
8 what is consistent with the purpose of the act and other
9 things are either neutral or negative. Don't interfere
10 with the State unless you have to.

11 MR. LAMKEN: That is one of our principal
12 contentions, Justice Breyer, which is --

13 JUSTICE GINSBURG: And what, Mr. Lamken, would
14 be the normal procedure in the State? You make an
15 application for a permit to a zoning board. What is the
16 standard operating procedure under State law? Suppose we
17 don't have any telecommunications act in the picture.

18 MR. LAMKEN: The normal procedure is either
19 under a uniform State law or California law. If you have
20 a -- an entity which is -- excuse me. If you have either
21 a planning commission or sometimes there's another entity
22 that does the initial review and makes a determination
23 whether to grant the permit. It is then appealable either
24 to a zoning board of adjustment -- that's the -- the model
25 act -- or in California, States -- localities have the

1 option of having the appeal go to the local legislature.
2 That appeal is then reviewed -- is then determined. And
3 finally, once you've gone through that process, under
4 California law it's generally reviewable by a writ of
5 mandate, although other -- other States provide review by
6 writ of certiorari, by mandamus, or by various other
7 procedures, almost always subject to a short limitations
8 period, almost always short -- requiring finality, a final
9 decision, exhaustion through the State process.

10 JUSTICE GINSBURG: And the remedies being
11 injunctive and declaratory.

12 MR. LAMKEN: A -- a form of specific relief.
13 Generally they have the authority to effectively go in and
14 revise the decision below, but the remedies ordinarily do
15 not include monetary or compensatory relief I should say.

16 JUSTICE GINSBURG: Are you saying that it's
17 parallel to what APA review of an agency decision would
18 be?

19 MR. LAMKEN: It's very much like that. The
20 remand rule that this Court normally requires in the APA
21 context is not so strictly observed in the context of --
22 of review of -- judicial review of zoning decisions, but
23 it is very much like APA review. That is what prevails.

24 JUSTICE KENNEDY: It -- it seems to me that the
25 30-day provision is inconsistent with the award of

1 damages, but after I say that, I can't tell you why.

2 (Laughter.)

3 MR. LAMKEN: Well, actually this Court's
4 decision in Burnett v. Grattan actually tells you why, and
5 that is that 30-day provisions, which are typical for on-
6 the-record review of decisions below, are often
7 insufficient to allow somebody to develop a whole new
8 record such as their proof of damages, to make important
9 decisions if they're going to have, for example, a jury
10 trial, or to prepare for discovery. And that's why 30-
11 day provisions are not entirely uncommon in the area of
12 judicial review of agency action, but they're wholly
13 unprecedented, for the most part that I know of, in the
14 area of tort-like remedies like section 1983.

15 If I -- if there are no further questions, I
16 would like to reserve the remainder of my time for
17 rebuttal.

18 JUSTICE STEVENS: Yes, you may.

19 Mr. Feldman.

20 ORAL ARGUMENT OF JAMES A. FELDMAN

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

23 MR. FELDMAN: Justice Stevens, and may it please
24 the Court:

25 Where Congress creates a special cause of action

1 for -- for a violation of a Federal law that necessarily
2 carries with it its own features and incidents, Congress'
3 decisions about the appropriate mechanisms for dealing
4 with that violation of Federal law should not be
5 frustrated or overridden by allowing a 1983 action in
6 addition.

7 In this case, section 332(c)(7)(B)(v), which
8 creates a cause of action for violation of the specific
9 standards in (i) through (iv) is an independent,
10 standalone cause of action. If 1983 didn't exist,
11 332(c)(7)(B)(v) would, undoubtedly, still provide
12 plaintiffs with a mechanism to get into court and attain
13 redress for the legal wrongs that they claim.

14 Where Congress has taken that step and has
15 thought about what the appropriate remedy should be for a
16 violation of a particular Federal statute and has created
17 a judicial remedy, then it would only frustrate --

18 JUSTICE O'CONNOR: But it -- the statute,
19 though, is silent on the question of damages or attorney's
20 fees, isn't it?

21 MR. FELDMAN: It is. It doesn't say anything
22 expressly about either of those things, but I think it has
23 long been --

24 JUSTICE O'CONNOR: Can we infer all appropriate
25 relief? Do we?

1 MR. FELDMAN: As a matter of damages, I think
2 all appropriate relief would be the standard. But as a
3 matter of attorney's fees, I think is a good example of
4 why there shouldn't be a 1983 action here because the law
5 is 100 percent clear, from this Court's decision in
6 Alyeska and other cases, that where Congress hasn't
7 provided for fee-shifting, there simply is no fee-shifting
8 authorized. That's what they intended.

9 JUSTICE SCALIA: Attorney's fees are never
10 appropriate, in other words.

11 MR. FELDMAN: Are never appropriate unless
12 Congress specifically provides for them.

13 JUSTICE STEVENS: But it has provided for them
14 for a 1983 action, and if it's a 1983 action, it takes
15 care of it.

16 MR. FELDMAN: That's right.

17 JUSTICE STEVENS: And this is kind of circular.

18 MR. FELDMAN: I don't think it's circular
19 because I think when Congress created the specific cause
20 of action here in (B)(v), it didn't provide for attorney's
21 fees and therefore intended that attorney's fees not be
22 provided. If respondent's view in this case were
23 accepted, the -- the presumption would be exactly flipped,
24 and Congress would have had --

25 JUSTICE GINSBURG: Mr. Feldman --

1 JUSTICE KENNEDY: Suppose Congress said
2 specifically 1983 applies. That's all it says. Would
3 that carry with it attorney's fees in your view?

4 MR. FELDMAN: Yes, I -- yes, I think it -- I
5 think it would.

6 The question here, though, is where Congress has
7 thought about what kind of remedy it wants for violation
8 of a Federal statute and created a judicial cause of
9 action for every wrong that's -- that -- that can exist
10 under that statute, then the incidents and features of
11 that cause of action should govern, not the incidents and
12 features of 1983 which almost inevitably and in this case
13 are different. And attorney's fees is just the best
14 example of that.

15 If -- under respondent's view -- when Congress
16 was fashioning this statute, it certainly was aware of
17 this Court's decisions that have repeatedly said that
18 attorney's fees are not available unless they're expressly
19 provided for. And indeed, elsewhere in the Communications
20 Act --

21 JUSTICE KENNEDY: Well, I take -- you -- you
22 take the position that 1983 doesn't apply at all. It's
23 not just attorney's fees. It's damages.

24 MR. FELDMAN: That's right. But it's just an
25 illustration. There's other differences between the

1 provision here and 1983, but I think the basic point is
2 that where Congress has given thought to the remedy for a
3 particular violation -- type of violation of Federal law
4 and has provided for a judicial cause of action, with
5 whatever features and incidents it -- it wants, 1983
6 shouldn't be allowed in. It should be assumed that
7 Congress didn't want to have its decisions frustrated by
8 also allowing a 1983 action.

9 JUSTICE SCALIA: What about damages?

10 JUSTICE O'CONNOR: Do you -- do you think that
11 any other provisions of the Communications Act are
12 enforceable under 1983? I mean, we're talking about 332,
13 but it's a big, complicated act. Are any of the other
14 provisions enforceable?

15 MR. FELDMAN: I think -- I think the same rule
16 would apply to any of the provisions where Congress has
17 specifically provided for a cause of action for the same
18 reason, otherwise Congress when -- here, for example, just
19 to return to attorney's fees for a second. When Congress
20 was framing this legislation, they knew that they weren't
21 giving attorney's fees and this 332(c)(7)(B)(v) would be
22 construed not to give attorney's fees, but not --

23 JUSTICE SCALIA: Well, this is really a more
24 general proposition you're urging upon us then, that
25 whenever Congress creates a cause of action that is --

1 what -- in any respect more limited than section 1983, the
2 background action of section 1983 is not available.

3 MR. FELDMAN: That -- I -- I think that's
4 correct.

5 JUSTICE BREYER: No. How could that be?
6 Wouldn't it depend on whether -- when you look at the
7 particular statute, the particular set of remedies that
8 Congress has included in that statute could be absolutely
9 independent of 1983 or dependent upon 1983 or leaning in
10 favor or leaning against. It would depend on the
11 particular statute. Why in general?

12 MR. FELDMAN: I think in -- I think the rule
13 would be in general because, first of all, it's not just
14 remedies. There's other incidents of a cause of action
15 such as statute of limitations, the provision here for
16 expedition, and other things. And really when Congress
17 has given thought to what remedy it wants for a violation
18 here of (i) through (iv), for a violation elsewhere in the
19 Communications Act of other Federal standards, it
20 shouldn't be assumed that they all -- that -- to allow a
21 1983 action would just frustrate Congress' intent in
22 fashioning that particular remedy.

23 JUSTICE GINSBURG: Then how would you ever have
24 a statute that -- 1983 provides for relief when there's a
25 violation of Federal law, statutory or constitutional.

1 One of briefs in this very case says that your broad
2 reading means that you were doing away with statute as a
3 basis for 1983.

4 MR. FELDMAN: I -- I think that that's
5 completely wrong. When Congress has created -- has
6 recognized a right, as this Court has found is essential
7 for a 1983 action, and it hasn't done anything about
8 providing a remedy for that right, hasn't created a cause
9 of action in court in particular, then that's the function
10 of 1983, is to serve -- it provides a cause of action for
11 people who suffer a violation of that wrong, a statutory
12 violation.

13 But where Congress has given thought to what
14 kind of relief it wanted and it said we want a cause of
15 action with these such-and-such incidents, no attorney's
16 fees, 30-day statute of limitations, expedition, whatever
17 the other ones are here, then it would just frustrate
18 Congress' intent to say, oh, and also you get a 1983
19 action to undo all of the things that Congress provided
20 for.

21 JUSTICE SCALIA: Well, there -- there are two
22 situations. I mean, one can supplement without
23 frustrating. I mean, you -- you could say that in, you
24 know -- in some respects the 1983 will contradict the
25 action that was provided, but one can conceive of a

1 provided action that -- that grants relief which 1983
2 would not grant.

3 MR. FELDMAN: That's right. And -- and I --
4 whatever -- I guess the general point would be whatever
5 remedial decisions Congress made, those should be
6 respected, but I would add in this case it's not just --
7 it's a question of attorney's fees, which they would have
8 had to -- Congress would have had to do something very
9 unusual here, which is particularly put in this statute no
10 -- there shall be no fee-shifting because otherwise you
11 can always go to 1983 and get it. In fact, even if they
12 had done that in 332(c)(7)(B)(v), respondents would still
13 argue, well, we still have our 1983 action.

14 JUSTICE SCALIA: What -- what about damages? Do
15 -- do you take any position on whether the Communications
16 Act provision enables damages to be collected?

17 MR. FELDMAN: We don't have a position on
18 whether it does. I think there's arguments both ways. I
19 would point out --

20 JUSTICE SCALIA: You think it's unnecessary to
21 decide this case.

22 MR. FELDMAN: I think it is unnecessary, and in
23 fact, I think it shows a problem with -- a reason why our
24 view, which is if Congress creates a cause of action, that
25 should be respected -- why that should be respected.

1 Under other views, you have to look at the 1983
2 action and figure out all of its incidents. You have to
3 look at the 332 action and figure out all of its incidents
4 in the abstract as here, not where -- in connection with a
5 particular claim for damages, and then see whether they're
6 consistent with each other.

7 I think the much better rule would be to say
8 where Congress has created a specific cause of action,
9 that's what it wanted, and whatever you get under that,
10 you get. Whatever you don't get under that, you don't
11 get. But 1983 shouldn't be used to -- to frustrate
12 Congress' intent and give you things that that cause of
13 action wouldn't to give you a longer statute of
14 limitations, which would be, I think, the case here, to
15 give you -- eliminate the provision for mandatory
16 expedition, to have any differences in damages.

17 Another way to put it would be under the Court's
18 decision in Franklin, this statute gives you any
19 appropriate relief. All that 1983 could do here -- it
20 maybe gives you the same thing which, as far as that goes,
21 it doesn't matter. But all it could do otherwise would be
22 give you inappropriate relief, i.e., relief that Congress
23 didn't want.

24 And instead of construing the two statutes in
25 that way, they should be construed harmoniously and in

1 accord with this Court's decisions which have set forth
2 the line of cases where you have a right to get into court
3 in Wilder -- I'm sorry -- in -- in Sea Clammers and Smith
4 against Robinson and said there we want to take Congress'
5 remedy, however simple or complex it is. It gives you a
6 complete right to get into court and gives you whatever it
7 gives you. And that should govern.

8 And then the other line of cases, which is
9 Wilder where -- and -- where it says -- and the Wright
10 against Roanoke where Congress didn't give you a right to
11 get to court -- get into court. In those cases, that's
12 the function of 1983.

13 The same thing would be true in -- in a number
14 of other this Court's cases that have recognized you have
15 a 1983 action when Congress gave you a right and didn't
16 think at all about the remedy because that's the function
17 that 1983 was supposed to serve.

18 If there's no further questions.

19 JUSTICE STEVENS: Thank you, Mr. Feldman.

20 Mr. Waxman.

21 ORAL ARGUMENT OF SETH P. WAXMAN

22 ON BEHALF OF THE RESPONDENT

23 MR. WAXMAN: Mr. Justice Stevens, and may it
24 please the Court:

25 In -- by its clear text, section 1983 promises

1 redress for the deprivation of any Federal right in any,
2 quote, proper proceeding. And that expansive language,
3 this Court has recognized, dictates a heavy presumption
4 that its remedies apply to all violations of Federal
5 rights, a presumption which this Court has said is
6 rebutted only in the, quote, exceptional case in which the
7 statute that creates the right is accompanied by an
8 enforcement scheme that is, quote, incompatible with or
9 inconsistent with 1983's remedies. That's --

10 JUSTICE SOUTER: Mr. Waxman.

11 MR. WAXMAN: -- the background principle.

12 JUSTICE SOUTER: Mr. Waxman, it seems to me that
13 the -- the best argument we've heard about incompatibility
14 is the one -- or at least I think the best -- is the one
15 that Mr. Lamken touched on at the tail end of his
16 argument, and that is, he said there's -- there's a 30-
17 day provision in there, which in effect says Congress
18 wants this litigation conducted fast and over with fast.
19 And that is incompatible with a damage action because if
20 you get into a damage action, you are going to get into
21 the panoply of -- of damages litigation, including
22 depositions, and -- and the one thing you can guarantee is
23 that it is not going to be over expeditiously.

24 What is your argument? What is your response to
25 that incompatibility argument?

1 MR. WAXMAN: Well, I think that the way this
2 Court has interpreted incompatibility before -- in the two
3 instances in 25 years since Maine v. Thiboutot was
4 decided, the only instances in which this Court has found
5 incompatibility has been where use of 1983 would create an
6 end run around limitations in the statute. That is, in
7 the -- in Sea Clammers and in Smith v. Robinson, you had
8 statutes that forestalled an individual's access to court
9 via an administrative regime and then expressly limited
10 the judicial remedies that would be available once they
11 got there by requiring, for example, only injunctive
12 relief.

13 JUSTICE BREYER: Well, the other word is
14 inconsistent, and is it -- sorry. Were you -- is it
15 inconsistent if Congress didn't want it? And if that's
16 insufficient to be inconsistent, then here, as I look at
17 the statute, to get out my thinking, I think that it
18 sounds like an administrative law statute. If I saw the
19 maintenance and cure words, I'd think it was an admiralty
20 statute.

21 MR. WAXMAN: Okay. I --

22 JUSTICE BREYER: But I see an administrative law
23 statute. It sounds like that's the system they're
24 imposing and therefore a system that is not consistent
25 with the administrative law system fails and 1983 seems to

1 fail.

2 MR. WAXMAN: Okay. Now I have two points. I --
3 I don't want to forget these. I have to deal with the --
4 the question of whether a 30-day requirement is
5 inconsistent and whether damages would be inconsistent
6 with what -- with what my colleagues posit as an APA-like
7 administrative review model.

8 A 30-day requirement is simply a reflection of
9 Congress' -- Congress confirming expressly that somebody
10 who -- who is aggrieved under the rights provided to him
11 under 332(c)(7) and wants any judicial remedy, whether
12 it's from 1983 or otherwise, has to go to court promptly.
13 It's precisely what 1983, this Court said in Patsy and
14 Felder, guarantees and requires. It does not require --

15 JUSTICE SOUTER: But it also requires`
16 expeditiousness on the part of the court.

17 MR. WAXMAN: It requires that the court proceed
18 expeditiously and courts can proceed expeditiously where
19 damages are sought or are not sought.

20 One of the interesting things about damages --

21 JUSTICE SOUTER: But do you -- do you agree with
22 this much, that if -- if damages, in fact, are going to be
23 allowed, what is going to count as expeditious is going to
24 be a lot slower than what is going to count as expeditious
25 if damages are not allowed.

1 MR. WAXMAN: I don't think that's true. In
2 fact, I think this case is a pretty good example. The
3 court separated it -- I mean, acting under a requirement
4 of expedition at the request of the city. This -- the
5 court didn't even begin to address this case until 18
6 months after it had been filed. But what it said was --
7 JUSTICE SOUTER: Okay. And -- and that --
8 MR. WAXMAN: -- the first issue --
9 JUSTICE SOUTER: -- that was a violation of the
10 statute, wasn't it?
11 MR. WAXMAN: Well, it first issued an order
12 saying, okay, I've construed the statute and I've
13 determined that the statute is violated. Now we will have
14 a separate proceeding. Then the city will conduct itself
15 accordingly. Now we'll have a separate proceeding in
16 order to determine whether damages or attorney's fees are
17 available. And that is available in any of these cases.
18 What --
19 JUSTICE SOUTER: So they turned the damage issue
20 basically just into a separate remedial hearing at the end
21 of the case.
22 MR. WAXMAN: It could or could not be, and there
23 may -- may be many cases when damages aren't appropriate
24 but --
25 JUSTICE GINSBURG: I thought that was just to

1 decide in -- in the -- in the court of first instance --
2 that tail end was not to decide whether in this specific
3 case damages or attorney's fees were due. But the
4 district court was deciding a question of law, that is,
5 whether in this kind of review proceeding anyone could
6 have damages, anyone could have attorney's fees.

7 MR. WAXMAN: What he said, Justice Ginsburg, was
8 we'll deal with what other remedies, if any, are available
9 and to what extent in a separate proceeding. As it turns
10 out, he concluded in an --

11 JUSTICE GINSBURG: But was not making a rule for
12 this case only. He was making a ruling of law.

13 MR. WAXMAN: For sure. He said that I don't
14 think you're entitled to this because I think that the
15 statute doesn't allow it. And therefore, he didn't get to
16 this question.

17 But the point about damages -- I think there are
18 two points that are very important they not be obscured.

19 First of all, the Government -- the fact that
20 the Government and the petitioner can't agree on whether
21 the statute itself provides damages relief under the
22 principle of Bell v. Hood and Franklin v. Gwinnett County
23 certainly shows that Congress did not speak expressly on
24 this subject.

25 JUSTICE SCALIA: They -- they don't necessarily

1 disagree. The Government just says the -- the issue
2 doesn't have to be reached in this case.

3 MR. WAXMAN: Well, I think -- I think that --
4 what the Government says in its papers is they may well be
5 available and what Mr. Feldman -- I don't want to misquote
6 him, but he said that under Franklin -- he agreed, I
7 think, with what Judge Posner wrote for the Seventh
8 Circuit, which is where no remedies -- where no specific
9 remedies are specified -- and that's the case here -- you
10 apply a rule of judicial implication, announced in Bell v.
11 Hood and applied to an implied right of action in
12 Franklin, to apply that all appropriate relief is
13 available. And damages are the paradigm.

14 JUSTICE SCALIA: Mr. Waxman.

15 MR. WAXMAN: And the irony here --

16 JUSTICE SCALIA: Mr. Waxman, how do you -- how
17 do you get a reading of the 30-day limitation, which is
18 applicable to the cause of action under the Communications
19 Act, sucked into the cause of action under section 1983?
20 I mean, if the suit is under 1983, it's under 1983.
21 There's no 30-day limit there.

22 MR. WAXMAN: I have -- I have two different ways
23 to get to that.

24 First of all, section 1983, by its terms,
25 provides redress in any appropriate cause of action. It

1 also supplies a cause of action where no other cause of
2 action is available, but by its express terms, it doesn't
3 exclusively limit its remedies to causes of action that
4 are brought under 1983.

5 JUSTICE SCALIA: No, it doesn't.

6 MR. WAXMAN: But more broadly --

7 JUSTICE SCALIA: But it doesn't require you to
8 -- to establish a cause of action under some other statute
9 either.

10 MR. WAXMAN: That's right. It provides a --

11 JUSTICE SCALIA: It does not at all. It's --
12 it's self-contained. And do you know any case where we
13 have read into, or indeed, it's even been urged upon us to
14 read into, section 1983 limitations that somehow come from
15 the statute that was violated and which forms the basis
16 for the 1983 action?

17 MR. WAXMAN: Well, I don't, but I do know that
18 this Court -- first of all, Congress has now enacted
19 section 1658 which provides a -- a 4-year Federal default
20 statute of limitations, where -- where a statute like 1983
21 doesn't provide it, but includes an -- an introduction
22 that says, except where otherwise provided by Federal law.
23 And there's certainly nothing in that language that says
24 when you're looking at whether a statute of limitations is
25 otherwise provided by Federal law, you look to the very

1 statute that creates the substantive right that 1983 is
2 enforcing.

3 And even before that, when your -- your decision
4 in Wilson v. Garcia made the point that when you try to
5 figure out what statute of limitations applies to a
6 freestanding 1983 action, there are -- there is a
7 tripartite rule of construction that section 1988 requires
8 you to engage in. And the first part is to see whether
9 there is any, quote, suitable Federal statute of
10 limitations.

11 Now, in constitutional cases, like the one that
12 was at issue in Wilson v. Garcia or under the Social
13 Security Act, which is what was addressed in Maine v.
14 Thiboutot, there were no express causes of action, much
15 less any express statute of limitations. And so this
16 Court said you then go to the second rule, which is what's
17 the most appropriate State limitations, as 1988 requires.

18 But the anomaly of the argument here is we have
19 a background principle that 1983 is available and there is
20 a heavy presumption that it will be available unless it is
21 explicitly incompatible or inconsistent with --

22 JUSTICE BREYER: Well, that's --

23 MR. WAXMAN: -- and --

24 JUSTICE BREYER: -- that's why I'm approaching
25 it differently, and I -- I want to get your view on it.

1 I'm taking the word inconsistent and I'm using that as a
2 guide back into the purpose of the statute. And once I do
3 that, I find Congress here anxious, I think, to engage in
4 what I'd call cooperative federalism. They could have run
5 the whole show, but they said we don't want the FCC. We
6 want each city and town to do what they want, subject to a
7 few minimal procedural requirements.

8 If that's right, that means all these damages
9 questions are open. All kinds of things are open, but --
10 and we'll decide them in a variety of ways, maybe
11 deferring to the State, but one thing is true: 1983
12 doesn't apply because that is a different set of remedies.

13 MR. WAXMAN: Justice Breyer, this is not the APA
14 model. This is not a model of administrative review for a
15 number of reasons.

16 Number one, it is a background -- there -- there
17 -- it is established, for purposes of this case, that this
18 statute creates individual Federal rights and those rights
19 were violated. And the background rule is uniformly --
20 and this Court has -- has -- in *Owens v. City of*
21 *Indianapolis* and many other cases has reinforced the
22 principle that damages are available and 1983 is available
23 where Federal rights are violated by municipalities,
24 whether it's under the Takings Clause or the Due Process
25 Clause or the Equal Protection Clause or in statutory

1 cases. What is more --

2 JUSTICE GINSBURG: Mr. Waxman -- Mr. Waxman, one
3 of these provisions gives you an option to go to the FCC,
4 the one having to do with emissions. Now, if you sought
5 review from the local decision to the FCC, you petition
6 for FCC relief, would the FCC have authority to give you
7 attorney's fees?

8 MR. WAXMAN: The FCC has said that it does not
9 if you do that. In -- in 2000, when the FCC last
10 reported, one person had chosen to go that route rather
11 than go to Federal court. It --

12 JUSTICE GINSBURG: Well, isn't that an
13 incongruity that Congress would say you have your choice?
14 Complainant, you can go to the Federal agency, the FCC, or
15 you can go to court.

16 MR. WAXMAN: You can't go to the -- excuse me.
17 I didn't --

18 JUSTICE GINSBURG: So if -- if you have that
19 choice, when you're dealing with the radio emissions, to
20 go the -- why would any litigant ever do that? Why would
21 any attorney ever do that if you don't get fees at the FCC
22 and you do get fees in court? Wouldn't the presumption be
23 that it would work the same way whether you go to the
24 agency, Federal agency, or Federal or State court, that
25 you're in the same situation as respect to fees?

1 MR. WAXMAN: The -- the FCC alternative for a
2 declaration by the FCC applies to only one of the five
3 rights that are provided here, and even if it applied to
4 all of them, I don't think you could possibly infer
5 that --

6 JUSTICE GINSBURG: Well, let's take the one,
7 that -- that one. Are you saying no attorney's fees there
8 because you couldn't get them at the FCC, therefore you
9 shouldn't get them in court?

10 MR. WAXMAN: Absolutely not. If -- if there
11 were an instance in which a local zoning official said,
12 you know, I know I'm not supposed to take radio
13 frequencies emissions into account, but I'm going to, it's
14 denied, I would have the right either to go to the FCC and
15 say, tell them no, or to file an action under 332 and/or
16 1983 and say that violates my rights. And actually your
17 example --

18 JUSTICE SOUTER: But isn't --

19 MR. WAXMAN: If I just may finish.

20 Your example, I think -- the example of this
21 particular provision points out that what -- the balance
22 of what I was going to explain to Justice Breyer, which is
23 that another reason why this isn't the APA model is that
24 this statute includes in little (i) and little (ii)
25 substantive provisions, not just procedural provisions.

1 You can't discriminate, to give Justice O'Connor's first
2 example, among providers. The -- that was a complaint in
3 this case. There is de novo review, it is clear, on those
4 claims. It's not administrative APA review in any
5 respect. And in fact, the district judge in this very
6 case, Judge Wilson, says it looks like, in fact, you were
7 discriminated against, but I don't need to reach that
8 because it's clear that there was no substantial evidence.

9 JUSTICE SCALIA: They -- they didn't provide for
10 the normal administrative review because they were quite
11 aware that under the State zoning systems, there would
12 always be State administrative review before the issue
13 even comes up.

14 MR. WAXMAN: And this --

15 JUSTICE SCALIA: And so what this provides is
16 what kind of judicial review there will be after the
17 anticipated administrative review before the zoning board
18 and whatever appeal from the zoning board exists.

19 MR. WAXMAN: I -- I have to respectfully
20 disagree. This Court, in -- in Williamson County and
21 Darby and many other cases, has distinguished carefully
22 between final -- final action and exhaustion of
23 administrative review or judicial review. And all this
24 statute requires is that if you are aggrieved by an action
25 or inaction of a State or local government or an

1 instrumentality thereof --

2 JUSTICE SCALIA: Final. Final action or failure

3 to act is what --

4 MR. WAXMAN: That's correct.

5 JUSTICE SCALIA: Final action or failure to.

6 MR. WAXMAN: And final action, this Court has

7 explained, does not import into it exhaustion of either

8 State administrative or judicial remedies. What it means

9 is that once you have been injured, it's a -- it's a

10 ripeness requirement that's familiar under --

11 JUSTICE SCALIA: You haven't been injured until

12 you've exhausted your --

13 MR. WAXMAN: That is --

14 JUSTICE SCALIA: You -- you really think that

15 when there is a State provision available for review of

16 the zoning board, you can commence an action under 1983

17 without even going through the administrative appeals?

18 MR. WAXMAN: I am entirely certain of that, and

19 in fact, the -- the local ordinance -- I mean, the

20 question of what is final agency action is surely a

21 Federal question, but --

22 JUSTICE SCALIA: Is really respecting the

23 States, which is what the -- the purpose of this -- of

24 this whole provision was.

25 MR. WAXMAN: Justice Scalia, when Congress

1 addressed this problem in 1996, as the Government points
2 out in the very first page of its brief and as the
3 legislative history reflects, it was confronting a
4 situation in which intransigent, entrenched zoning
5 authorities were acting arbitrarily to frustrate the
6 creation of a national wireless network. And it was so
7 concerned about this that the House actually passed a
8 provision that removed this paradigmatic local authority
9 to the FCC. The FCC was --

10 JUSTICE KENNEDY: Which would be more
11 burdensome? That enactment or subjecting municipalities
12 nationwide to damages? Which would be more intrusive and
13 burdensome on federalism --

14 MR. WAXMAN: I think --

15 JUSTICE KENNEDY: -- and the abilities of local
16 governments to function?

17 MR. WAXMAN: Oh, I think the former, for sure.
18 I mean, the notion that zoning decisions, siting decisions
19 would be removed entirely from localities is unbelievably
20 intrusive.

21 And what happened in the conference committee
22 was a compromise was reached whereby Congress' objective
23 was going to be achieved by creating -- by leaving it, in
24 the first instance, Justice Kennedy, to local --

25 JUSTICE KENNEDY: Well, I'm -- I'm not so sure

1 because you're arguing that even the smallest municipality
2 can be liable for hundreds of thousands of dollars of
3 attorney's fees.

4 MR. WAXMAN: Well --

5 JUSTICE KENNEDY: And I --

6 MR. WAXMAN: -- let me just say this, with
7 respect to the --

8 JUSTICE KENNEDY: Plus other -- plus other
9 damages.

10 MR. WAXMAN: I think this case, Justice Kennedy
11 -- I have three things to say about this.

12 This case is every bit as -- as paradigmatic as
13 the parade of horrors that they suggest. And here's my
14 proof. It has been since 1997 that courts have been
15 ruling that 1983 and damages are available under this
16 statute. There is no evidence in any of the briefs on the
17 other side or any of their amici that there has either
18 been a flood of litigation or inappropriately large
19 awards.

20 And if that happened, Congress would do -- would
21 be attentive to it in the way that Justice Ginsburg
22 pointed out when the local cable authorities came to --
23 came to the very same committees 4 years before and said,
24 we're being hit -- there's an express right of action in
25 555 of the -- the Communications Act. We're being hit

1 with very large 1983 awards. Please do something about
2 it. And the very same committees 4 years before enacted a
3 provision that said you may get only injunctive and
4 declaratory relief, thereby creating an incompatibility
5 with 1983, as the legislative history expressly provides.

6 JUSTICE SCALIA: Well, cable -- cable media
7 companies may -- may have Congress' ear more readily than
8 -- than -- you know, than the municipality of whatever
9 this is or any --

10 MR. WAXMAN: State and -- than State and local
11 governments? I hope not. But here's -- here's the
12 additional --

13 JUSTICE SCALIA: But I -- I wouldn't put a lot
14 of money on it.

15 (Laughter.)

16 MR. WAXMAN: The point is that Congress --
17 Justice Kennedy, the point is not that Congress was being
18 inattentive to State and local budgets. What it wanted to
19 do what was this -- the point this Court the addressed in
20 -- in Stakura and -- and Owens v. City of Indianapolis,
21 which is to enforce a Federal statute through privately
22 enforceable Federal rights, which would include a damages
23 remedy that both provides a deterrent against conduct that
24 had provided entrenched resistance to a Federal program
25 and provide compensation where reasonable and appropriate.

1 Now, this Court has made clear, with respect to
2 damages, in -- in Carey v. Piphus and other cases, that
3 there may be very many cases in which there's a violation
4 of a procedural right but only nominal damages are
5 available. And in Buckhannon --

6 JUSTICE GINSBURG: But with respect to --

7 MR. WAXMAN: If I may just finish this sentence.
8 And in Buckhannon and Farrar v. Hobby, this Court has --
9 has recognized that in order to get attorney's fees, you
10 have to have substantially prevailed and a court, under
11 1988(b), may award attorney's fees in its -- may award --
12 in its discretion insofar as they are reasonable. And --

13 JUSTICE GINSBURG: Mr. -- Mr. Waxman.

14 MR. WAXMAN: Yes, Justice Ginsburg.

15 JUSTICE GINSBURG: There is in this legislative
16 record a concern expressed by a Senator from California
17 when there was a proposal on the table to make the FCC the
18 Federal review forum. And that was rejected, if I
19 understand correctly, because there was a concern that
20 municipalities would have to travel all the way to
21 Washington, D.C. to defend in the FCC's forum. And
22 Congress did not want to saddle municipalities with the
23 cost of transporting their representative to D.C. Well,
24 that cost would pale compared to attorney's fees that
25 would be awarded.

1 MR. WAXMAN: First of all, Justice Ginsburg, I
2 -- the reference to those two Senators -- what those two
3 Senators were talking about is not, as my colleague's
4 brief suggests, this provision. They were talking about
5 another provision of the Telecom Act. I think it was
6 section 253, but I may be wrong.

7 But even if that's the case, the fact of the
8 matter is that whether it was going to cost them -- I
9 agree. It would cost -- look, a regime in -- which left
10 all of these siting decisions to the FCC is breathtaking,
11 and it certainly would impose lots of costs not only on
12 local municipalities to have to come to Washington to
13 justify these decisions, but certainly on the FCC, which
14 would have to send an army out to example -- I mean, it
15 would sort of like be the -- the television commercial,
16 you know, where the guy is walking around saying, you
17 know, can you hear me now, can you hear me now? The fact
18 is it made great sense to continue to leave the initial
19 decisions with local authorities.

20 But Congress had -- was frustrated, expressly
21 frustrated with the fact that the prior regime, in which
22 they had let local authorities do it under their normal
23 routines and applying the normal remedies, was not getting
24 the job done. That was the imperative of this statute.
25 And in the -- in the absence of any evidence, even now 11

1 years later -- or I guess it's 10 years -- 9 years later.
2 In the absence of any evidence of a flood of litigation or
3 inappropriate awards, I think given the very heavy
4 presumption that this Court has recognized over and over
5 and over again, that 1983 is there.

6 JUSTICE BREYER: That isn't the only --

7 MR. WAXMAN: 1983 is the background principle
8 against which Congress legislates. And this statute
9 either -- neither provides nor excludes any remedies, and
10 all it does is confirm that when you go -- when you are
11 injured, you can go to court. And --

12 JUSTICE BREYER: The other -- the other harm is
13 there any evidence of because it's -- it would also be
14 harmful if local zoning boards, when faced with quite
15 difficult decisions, because the -- the antenna -- they
16 bristle up and you put them in the wrong place. They're
17 environmentally harmful. They -- there are a lot of bad
18 things, as well as good things about them. And of course,
19 it would be a bad impact if we discovered that the zoning
20 boards were erring too much on the side of granting
21 everybody's application, as well as too much on the side
22 of not granting them.

23 MR. WAXMAN: To be sure.

24 JUSTICE BREYER: And so I -- I don't know how --
25 what the -- there won't be evidence. How can we get

1 evidence on such a thing?

2 MR. WAXMAN: The -- the -- you -- the evidence
3 will be either in the decided cases or by local municipal
4 governments coming to Congress and saying, this is too
5 heavy a thumb on the scale. But what we know is that if
6 you afford only prospective relief, which is the -- the
7 ancien regime that Congress was -- that Congress felt
8 wasn't doing the job, it provides no deterrent, no
9 incentive to accomplish what Congress said was --

10 JUSTICE KENNEDY: But I -- I don't think we --

11 MR. WAXMAN: -- a compelling national objective.

12 JUSTICE KENNEDY: I don't think we usually think
13 of -- of judicial review of agency decisions in the
14 ordinary course as being a deterrent.

15 MR. WAXMAN: We --

16 JUSTICE KENNEDY: It's an opportunity to
17 elaborate reasons. It's a safeguard. It's not a
18 deterrent. And you're saying it has to be a deterrent.
19 And as Justice Breyer indicates, it -- it means that
20 there's -- there's another voice in that -- in that
21 administrative hearing room. They're terrified of
22 damages.

23 MR. WAXMAN: Justice Kennedy --

24 JUSTICE KENNEDY: And it's going to skew the
25 decisions.

1 MR. WAXMAN: Justice Kennedy, it -- under their
2 -- under the regulations of this municipality, which is --
3 is perfectly representative, it is final agency action
4 when the city planning commissioner says no, unless you
5 choose to appeal it to the city council.

6 And there is -- not only is there nothing
7 peculiar about applying 1983 damages awards to the
8 violation by a State and local government of an express
9 Federal right, assuming you can prove not only that the
10 right was violated but also that you were really damaged.
11 It's -- I'm not suggesting that -- that Congress had
12 damages in mind specifically and only to deter conduct.
13 You have said in a variety of instances -- I mentioned
14 Stacura in particular -- that 1983 damages do serve as a
15 deterrent to violation of Federal rights by municipal
16 local officials.

17 But what Congress had -- Congress had to come up
18 with some way to confront this problem in which there were
19 sort of local parochial --

20 JUSTICE STEVENS: May I ask this question, Mr.
21 Waxman? I don't know if it's really a legal question
22 exactly, but I have the impression that most of the
23 plaintiffs in this type of litigation are well-financed,
24 large companies rather than the typical 1983 plaintiff.
25 And therefore, you don't need the attorney's fee incentive

1 to be sure these rights are protected. Is that a correct
2 impression or is it incorrect?

3 MR. WAXMAN: I -- I don't know whether it's a
4 correct impression or not. Our brief points the Court to
5 an authority that at least 9,500 of the entities that have
6 -- have created antennas or tower facilities have 10 or
7 fewer facilities.

8 And one thing we know for sure is that when
9 Congress enacted the Telecom Act of 1996, it specifically
10 wanted to encourage small operations, start-up companies.
11 It had specific provisions in the law to give special
12 treatment to small entrepreneurs in order to foster
13 diversity and competition. But in the event that you --

14 JUSTICE SCALIA: I can't imagine -- I can't
15 imagine, Mr. Waxman, that Congress wanted to impose
16 damages plus attorney's fees upon municipalities without
17 even giving the municipalities the chance to correct their
18 mistakes, which is what you're saying.

19 MR. WAXMAN: Well --

20 JUSTICE SCALIA: You're saying the
21 municipalities' appeal system, which is there for people
22 to take advantage of, is just washed out. One mistake at
23 the lowest level and you get damages and you get
24 attorney's fees. That -- that is extraordinary.

25 MR. WAXMAN: Justice Scalia, the -- the -- 1983

1 -- and your jurisprudence shouts this as clearly as it
2 does any other principle -- stands for the proposition
3 that it's there unless, in the explicit language of the
4 statute that creates the right, there is a demonstrated
5 incompatibility. And that's the background rule.

6 There are many instances in the Telecom Act and
7 elsewhere in which Congress has said you can only get
8 injunctive relief. You may not get 1983 damages. I mean,
9 go back to *Adickes v. Kress* where this Court said in title
10 II of the Public Accommodations act, Congress expressly --
11 expressly precluded damages in order to avoid invocation
12 of 1983.

13 And I'm not saying that Congress had in mind my
14 client, who is an individual, a sole entrepreneur, who was
15 subject to, I think what the record shows is, prolonged
16 and entrenched intransigence by this particular
17 municipality, any more than it had Judge Posner's example
18 in the Seventh Circuit where it was, you know, *Verizon v.*
19 *the Village of Mequon*.

20 But this Court has recognized, as have the lower
21 courts, that you only get damages if you prove that you
22 really have been damaged. And in an instance where
23 there's some procedural violation and a remand to correct
24 it, this may very well be the instance of *Carey v. Piphus*,
25 where the damages are purely nominal. The agency is given

1 the opportunity.

2 In this case, the city never said, give us the
3 opportunity to go back and correct it. And Judge Wilson,
4 a very level-headed district judge, said there's nothing
5 to go back and correct because the only thing -- the only
6 reason that the city gave was it didn't like this antenna
7 and tower in the first place. It -- we concede that it
8 makes no difference to anybody which frequencies are being
9 broadcast from this tower that we approved 10 years ago
10 and have no right to modify. And therefore, there was a
11 substantive violation, not just, you know, you -- you may
12 have had substantial evidence but you didn't lay it all
13 out or you gave your reasons at length and orally but not
14 in writing, I'll give you the opportunity to go back.

15 There's a line of cases this Court has decided
16 under the Social Security Act where there have been
17 remands to correct procedural errors or small errors, and
18 in those instances, *Carey v. Piphus* says you don't get
19 damages. And under *Buckhannon* and *Farrar v. Hobby*, you
20 probably don't get attorney's fees either.

21 If there ever is the sort of parade of horrors
22 that they protest about, even a small parade of horrors,
23 Congress will be as attentive as it was in 1992 when the
24 cable --

25 JUSTICE STEVENS: Thank you, Mr. Waxman.

1 MR. WAXMAN: Thank you.

2 JUSTICE STEVENS: Mr. Lamken, you have about 4
3 minutes left.

4 REBUTTAL ARGUMENT OF JEFFREY A. LAMKEN

5 ON BEHALF OF THE PETITIONERS

6 MR. LAMKEN: I'd like to make only two brief
7 points.

8 First, that the imposition of the -- of damages
9 and fees under section 1983 from a decision in this Court
10 for even good faith mistakes in the implementation of the
11 antenna siting rules, which are often complex and
12 uncertain, would be a welcome mat for extensive and
13 aggressive litigation and the imposition of extensive fees
14 on municipalities which simply cannot afford to enforce
15 their zoning rules, the rules that Congress expressly
16 attempted to preserve in the statute itself.

17 It is -- in this case alone, for example,
18 respondent's most recent estimate of his damages and fees
19 -- and this was before he retained Mr. Waxman, I might add
20 -- is -- is \$15 million, essentially the city's entire
21 budget for a year. And respondent claims to be a
22 relatively small operator. That sort of -- with that sort
23 of liability in an uncertain area of law, very few
24 municipalities could ever afford to stand on their rights
25 to enforce local zoning even when they're relatively

1 certain that they are right.

2 Section 332(c)(7) is entitled and has one of its
3 purposes as the preservation of local authority. It
4 should not be construed to provide for that authority's
5 evisceration.

6 The second point I wanted to hit is that when
7 Congress established the mechanism for review in 332, it
8 provided a very adapted mechanism with an unusual pair of
9 characteristics: a very short limitations period and
10 mandatory expedition. This Court's decisions in Novotny
11 makes it clear that neither of those requirements can be
12 simply transferred over to section 1983. Novotny had very
13 similar language, a 90-day limitations period. The Court
14 did not transfer that over to section 1985(3). Instead it
15 understood that the general rule, the general Federal
16 principle of law, that in the absence of an express
17 limitations period, that State law would control. Wilson
18 then confirms that rule, as an interpretation of section
19 1988, that the governing Federal principle is that State
20 law controls unless there's an express Federal cause of --
21 statute that addresses that particular cause of action.

22 If there are no further questions, we ask only
23 that the judgment of the Ninth Circuit be reversed. Thank
24 you.

25 JUSTICE STEVENS: Thank you, Mr. Lamken.

1 The case is submitted.
2 (Whereupon, at 11:01 a.m., the case in the
3 above-entitled matter was submitted.)

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